Supreme Court, U.S.
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No. 87-2127

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN FOREIGN SERVICE ASSOCIATION, *et al.*,
Appellants,

v.

STEVEN GARFINKEL, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OPPOSITION TO MOTION TO AFFIRM

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

OPPOSITION TO MOTION TO AFFIRM

Nowhere in their motion to affirm do appellees even attempt to show, as required to obtain summary affirmance under Rule 16.1(c) of this Court, that "it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." On the contrary, the very length and complexity of their motion underscore the novelty and importance of the issues raised in this case and the necessity for plenary review of the district court's broad holding of unconstitutionality. Thus, although the district court decided this case by declaring that Section 630 was unconstitutional in every conceivable application, appellees seek affirmance based on recent developments, which they claim render challenges to their noncompliance with certain parts of Section 630 moot, and on several arguments that were never presented to, let alone adopted by, the district court.

We first address appellees' claim that the challenges to the portions of Section 630 that limit the type of information that may be covered by nondisclosure agreements are moot, and then we respond to appellees' contention that Section 630's other provisions, which limit the extent to which nondisclosure agreements may impose obligations that are inconsistent with statutes and may prohibit employees from providing information to Congress, are so blatantly unconstitutional in all of their applications that this Court should summarily affirm the district court's declaration of facial unconstitutionality.[1]

1. Appellees do not contend that the district court was correct in holding unconstitutional Section 630's prohibition on the use of the term "classifiable" and its other restrictions in subsection 1 on the information that may be covered by nondisclosure agreements. Rather, they assert that this controversy is now moot, because, after convincing the district court to invalidate Section 630, and being ordered in the companion cases to delete or narrowly define "classifiable," they deleted the term "classifiable" from future nondisclosure agreements and took other actions, which they claim meet the principal concerns embodied in subsection 1. Motion at 14-15, 18-19; Appellants' App. D and E, attached as Appendices to this Opposition. Not only do appellees' actions fall far short of full compliance with Section 630, but, even if they had complied, the district court's judgment should be vacated as moot, not summarily affirmed. *United States v. Munsingwear*, 340 U.S. 36 (1950).

Despite appellees' assertions to the contrary, they have not complied with the first two provisions of Section 630 in two

[1]Section 619 of the Treasury, Postal Service and General Appropriations Act of 1989, Pub. L. No. 100-440, 102 Stat. 1721, which the President signed on September 22, 1988, is identical to Section 630 and continues its terms through Fiscal Year 1989. For convenience, we refer to them collectively as Section 630.

respects. First, although the new nondisclosure agreements — SF 312 and 4355 — omit the term "classifiable," the 49,000 SF 189 and SF 4193 agreements signed during Fiscal Year 1988, as well as the forms signed before the Section 630 ban, retain that term. *See* General Accounting Office Testimony, *Congress and the Administration's Secrecy Pledges: Hearing Before Legislation and National Security Subcommittee, House Government Operations Committee*, at 5-6, 100th Cong., 2d Sess. (Aug. 10, 1988). Even compliance with the district court's orders in the companion cases would not render the challenge under subsection 2 moot, because those orders allow the continued use of the term "classifiable," provided that it is narrowly defined. Appellants' App. D and E. Moreover, appellees do not plan to give notice of even those changes to former employees who remain bound by the agreements after they leave government service. In addition, appellees have never promised that they will not seek sanctions for disclosures of "classifiable" information made by appellants and others prior to the deletion of that term from the forms, which, of course, would violate Section 630's enforcement ban.

Second, neither appellees' clarification of the information covered by SF 189, nor the newly issued SF 312 or SF 4355 agreements, comply with subsection 1 of Section 630, which limits nondisclosure agreements to information that is "specifically marked as classified" or "unmarked but known by the employee to be [either] classified" or "in the process of a classification determination." Both appellees' clarification and the new forms go beyond subsection 1 to cover unmarked information that the individual "reasonably should know" is classified or in the process of a classification determination. 53 Fed. Reg. 38,279 (Sept. 29, 1988) (32 C.F.R. § 2003.-20(h)(3)).

Appellees do not claim that they have complied with subsection 1's actual notice requirement, but only that they have met

Congress' "principal concerns" and that their forms are in "harmony" with subsections 1 and 2. Motion at 19-21. However, Congress's principal concern was to ensure that employees will be bound by the pervasive obligations in the nondisclosure agreements (including liability for negligent and reckless handling of classified information) only where they have actual notice that the terms apply. As appellant Senator Charles Grassley put it: "How does one know when information is classified? The answer is that it is marked 'classified.' How does one know something is classifiable? The answer is that one cannot know." *Classified Information Nondisclosure Agreements: Hearing before the Subcommittee on Human Resources, House Committee on Post Office and Civil Service,* at 9, 100th Cong., 1st Sess. (Serial No. 100-37, Oct. 15, 1987). In order to ensure that employees would not be forced to speculate as to whether particular information is covered by a nondisclosure agreement, Congress limited the agreements to information that the employee actually knows is covered. However, because appellees' definition binds employees to the more expansive "reasonably should have known" standard barred by subsection 1, this issue is plainly not moot.[2]

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[2]Appellees also argue that subsection 1's actual notice requirement does not define what information may be covered by a nondisclosure agreement, but rather merely establishes the standard of care for violations of the nondisclosure agreements' obligations. Motion at 20-21. Not only does this argument run counter to Congress' plain intent, but it also was not raised below and hence cannot be the basis for summary affirmance.

In the companion cases, the district court likewise recognized the distinction between actual notice and a "reasonably should have known" standard. Thus, after holding that the term "classifiable" is "far too broad to comport with the constitutional requirement that restraints on free speech be narrowly drawn to bar no more speech than is necessary," the district court concluded actual notice is not necessary to remove the First Amendment flaw, but rather imputed knowledge may suffice. *Na-*

Even if appellees had in fact fully complied with subsections 1 and 2 of Section 630, it would not be proper for this Court to summarily affirm the district court decision or even to vacate the lower court opinion as moot because appellees have made it absolutely clear that they do not feel bound to comply with Section 630 because they believe it is unconstitutional. Indeed, as appellees concede, "the President directed that . . . Section 619 will be considered to be of no force and effect unless and until this Court reverses the ruling of the district court in the instant case holding the identical provisions in Section 630 of the 1988 Act unconstitutional." Motion at 14, *citing* 24 Weekly Comp. Pres. Docs. 1189. Therefore, since appellees remain entirely free to return to their old ways and seem likely to do so, this case should not be dismissed on mootness grounds, even as to those portions of Section 630 with which appellees are now complying. *United States v. Generix Drug Corp.*, 460 U.S. 453, 456-57 n.6 (1983); *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953).

2. Appellees never contend that they are complying with subsections 3 and 4, the provisions concerning disclosures to Congress, or subsection 5, which forbids the President from imposing obligations through nondisclosure agreements that are inconsistent with other statutes. Therefore, with respect to these provisions, as well as subsection 1's actual notice requirement, this case is not moot.

To the extent that appellees seek to defend the district court judgment, rather than argue that the case is moot, they do so primarily on the grounds other than the one on which the

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tional Federation of Federal Employees v. United States, No. 87-2284-OG, slip op. at 14-18, 21 (July 29, 1988); Appellees' App. B, at 16a-19a, 23a. Even if the First Amendment requires only what the district court ordered, Congress is not limited to that standard in legislation, such as Section 630.

district court relied. Thus, appellees contend that the district court could have declined to issue equitable relief in its discretion, without finding Section 630 unconstitutional, Motion at 28-29, and that appellants have no standing to vindicate the rights of Congress protected by subsection 4. *Id.* at 23 n.22. Similarly, appellees claim that the whistleblower protections of the Civil Service Reform Act, 5 U.S.C. § 2302(b), constitute the sole statute undermined by the nondisclosure agreements, Motion at 23 n. 22, thereby ignoring other statutes, such as 5 U.S.C. § 7211, which protects federal employees' rights to petition and furnish information to Congress and its members, and which also impose limitations on the terms of nondisclosure agreements through Section 630. While we do not suggest that appellees may not raise such arguments in seeking to defend the district court's dismissal of the complaint, they are not the ones adopted by the district court below, and do not support summary affirmance.

3. Appellees defend the separation of powers ruling of the district court only with respect to subsection 1's actual notice requirement and subsection 3, which protects employees' disclosures to Members of Congress. Motion at 21-27. In defending these aspects of the district court's decision, appellees assume that Section 630 is unconstitutional on its face simply because it may have some applications that are unconstitutional. But that approach stands on its head the presumption of constitutionality that attaches to laws duly passed by the Congress and signed by the President. *Morrison v. Olson*, ____ U.S. ____, 108 S. Ct. 2597, 2614 (1988); *Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 571 (1973). Thus, even if some application of a law may violate separation of powers principles, a point that we do not concede with respect to Section 630, that does not make the entire law unconstitutional. *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

Similarly, appellees focus exclusively on the President's role in protecting national security information to support the decision below, but make no mention of Congress' substantial need for access to national security information in carrying out its constitutionally assigned functions under Article I, § 8, let alone of the proper balance between the competing needs and roles of the Executive and Legislative Branches in this area. Also wholly missing from appellees' motion is any discussion of Congress's role as the repository of legislative power and of the effect of legislative action, such as Section 630, on the President's authority to act under the standards set forth in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Most importantly, at no place do appellees dispute that the ruling of the district court striking down Section 630 as unconstitutional on its face raises substantial issues concerning the role that Congress may constitutionally play in regulating the disclosure of national security information in a whole array of other statutes in addition to Section 630. Indeed, the lower court decision marks the first occasion in which a court has declared a duly enacted statute unconstitutional on the basis of the Executive Branch's inherent power in the national security area. It also marks the first decision declaring that Congress has *no* authority to enact legislation that regulates the President's power to limit the disclosure of national security information. Thus, it is not surprising that, despite the length and breadth of their motion, appellees, like the district court, cited no cases that previously addressed these novel issues, let alone that control their outcome. In light of the significant new ground broken by the lower court's decision, the Court should deny appellees' motion to affirm.

CONCLUSION

For the foregoing reasons, this Court should deny appellees' motion to affirm and note probable jurisdiction.

Respectfully submitted,

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Attorneys for Appellants

October 17, 1988

Appendix D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,	)	
Plaintiff,	)	Civil Action
v.	)	No. 87-2284-OG
	)	
	)	**FILED**
UNITED STATES OF AMERICA, *et al.*,	)	**JUL 29, 1988**
	)	**Clerk,**
Defendants.	)	**U.S. District Court District of Columbia**
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,	)	
	)	Civil Action
Plaintiffs,	)	No. 87-2412-OG
v.	)	
	)	
STEVEN GARFINKEL, *et al.*,	)	
Defendants.	)	

FINAL JUDGMENT AND ORDER

Upon consideration of defendants' Motion to Dismiss and plaintiffs' Motions for Summary Judgment, the oppositions thereto, and the record herein, and for the reasons stated in the accompanying memorandum, it is by the Court this *28th* day of July, 1988

ORDERED that defendants' Motion to Dismiss be, and hereby is, granted as to counts V and VII in Civil Action No. 87-2412 and denied as to the remaining counts; and it is further

ORDERED that plaintiffs' Motions for Summary Judgment be, and hereby are, granted, in part, as to count II in Civil Action No. 87-2284 and as to counts I and II in Civil Action

No. 872412, and denied as to all remaining counts; and it is further

ADJUDGED AND DETERMINED that use of the term "classifiable" in SF 189, SF 4193, DD 1847-1, or any other nondisclosure agreement is unconstitutional unless the form includes or is accompanied by the definition of "classifiable" that appears in 32 C.F.R. § 2003.20(h)(1); and it is further

ADJUDGED AND DETERMINED that an agreement includes or is accompanied by the definition of "classifiable" that appears in 32 C.F.R. § 2003.20(h)(1) if this section of the C.F.R. is reprinted and:

(1) Presented to the employee at the time the agreement is executed; or

(2) Delivered within sixty (60) days of the date of this Order to the employee who has already signed the agreement; and it is further

ORDERED that until the employee receives a copy of the definition of "classifiable," the nondisclosure agreement may not be enforced to penalize the employee for disclosure of "classifiable" information; and it is further

ORDERED that in lieu of delivery or presentment of the definition of "classifiable," the Information Security Oversight Office, the Director of Central Intelligence, the Department of Defense, and any other agency that has used a nondisclosure agreement containing the word "classifiable" may notify every employee that has signed such an agreement that "classifiable" is stricken from the agreement and that liability shall not arise under the agreement for disclosure of "classifiable" information; and it is further

ORDERED that within sixty (60) days of the date of this Order each employee that has signed a nondisclosure agreement containing the word "classifiable" shall receive a copy of the definition of "classifiable" that appears in 32 C.F.R. § 2003.20(h)(1) or notice that the word is stricken from the agreement and shall not be a basis for liability.

/s/ **Oliver Gasch**

United States District Judge
Oliver Gasch

Appendix E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, *Plaintiff,*	)	Civil Action No. 87-2284-OG
v.	)	
UNITED STATES OF AMERICA, *et al.*, *Defendants.*	)	**FILED SEP 26, 1988 Clerk, U.S. District Court District of Columbia**
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*, *Plaintiffs,*	)	Civil Action No. 87-2412OG
v.	)	
STEVEN GARFINKEL, *et al.*, *Defendants.*	)	

ORDER

Upon consideration of the defendants' motion to alter or amend judgment, the oppositions thereto, and the record herein, and it appearing from the representations of government counsel in open court that the word "classifiable" has been deleted in some instances and other words substituted therefor; and it further appearing that to the extent that "classifiable" is still deemed binding on certain government employees, that those who are deemed bound by the non-disclosure agreement be given actual notice as hereinafter provided, it is by the Court this *25th* day of September, 1988,

ORDERED, that defendants' motion be, and hereby is, granted in part and denied in part; and it is further

ORDERED that the defendants are granted an additional thirty (30) days within which to comply with this Court's Order of July 29, 1988, so that within ninety (90) days of the date of the Court's original Order, each employee who has signed a nondisclosure agreement containing the word "classifiable" shall either receive a copy of the definition of "classifiable" as the same appears in 32 C.F.R. § 2003.20(h)(1) or notice that the word has been stricken from the agreement and what, if any, words have been substituted in lieu thereof.

/s/ **Oliver Gasch**

Judge